CONFIDENTIAL

23 OCT 1979

MEMORANDUM FOR: Inspector General

FROM: Don I. Wortman
Deputy Director for Administration

SUBJECT: Inspector General's Draft Report on Industrial Contracting and Security, August 1979 [redacted] 25X1

1. Introduction

The purpose of this memorandum is to provide you with our views and recommendations on the subject draft report. Our comments are divided into three areas: the first sets forth comments based on an overview of the report; the second provides specific comments on the formal recommendations made in the report; and the third provides comments and recommended changes or corrections covering various segments of the text of the draft report. [redacted] 25X1

2. Comments Based on an Overview of the Report

a. Subject report culminates the most exhaustive review to date of industrial contracting and security by the Office of the Inspector General. It should be noted that this is the seventh review of some part of the acquisition process in the last 3 years. We believe that overall the draft report presents a balanced view of the acquisition process within the Central Intelligence Agency. This is not to say that we agree with all conclusions and recommendations made in the report, but we do feel that the members of the task force approached the review with open minds and with a desire to identify problem areas and to make recommendations to improve our procurement system. It was noted that the text of the report contained numerous informal recommendations which were not set forth under Tab A - Recommendations Recapitulated. These recommendations will be considered, but we do not contemplate providing any formal status report on their acceptance or rejection. [redacted] 25X1

25X1

OL 9 4245

[redacted]

CONFIDENTIAL

OS 9 2570

SUBJECT: Inspector General's Draft Report on Industrial Contracting and Security, August 1979 [redacted] 25X1

b. There is a recurring theme throughout the report (pp. 17-18, pp. 37-40, p. 46, p. 65, pp. 69-70, pp. 73-74, pp. 90-93, pp. 99-100, and pp. 209-215) that there is a lack of personnel resources available to satisfy the requirements which must be met in the acquisition process. Yet there is no recommendation that additional personnel resources be authorized. This issue should be examined to determine if such a recommendation is warranted. [redacted] 25X1

c. There are some important security issues which we feel deserve comment. These can be summarized as follows:

(1) We are aware of the contractor's desire for increased "interaction" between the Agency and themselves prior to our promulgation of policies having broad application within the industrial arena. We believe, however, that the informal communications mechanism existing between the contractor and the industrial security officer, in addition to periodic conferences at contractor facilities and at CIA Headquarters, provides adequate means of furnishing information to the contractor and for receiving appropriate feedback. An Industrial Security Seminar, attended by 61 contractor security officials representing 40 companies, was held at Headquarters on 26 and 27 September 1979. In the final analysis, however, since it is the Agency's information which must be protected, the Agency must reserve the right to establish standards it considers appropriate. [redacted] 25X1

(2) The contractor's concerns over the proposed APEX industrial security standards are well known, but we believe that it is inappropriate to highlight their reactions in the report. The draft APEX manual was incorrectly and improperly released by another Government agency before it had been coordinated within the Intelligence Community.

SUBJECT: Inspector General's Draft Report on Industrial Contracting and Security, August 1979 [redacted] 25X1

Working level industrial and contractor security officers have not yet been fully briefed on the APEX proposal and, in fact, at this writing it is not known whether the APEX proposal will even be approved. It is unfair and improper to criticize them for not having coordinated APEX with their contractors. We have noted with interest contractor concerns regarding the stringent physical security standards included in the new APEX manual. We see merit in their (regrettably premature) criticism, and the entire issue of physical storage standards is under review by a DCI Security Committee working group. [redacted] 25X1

(3) We recognize that there is considerable merit in the Inspector General's contention that unannounced audits are counterproductive. However, these negative aspects must be balanced against the contractors' penchant for anticipating audits with temporary, cosmetic changes. Although the rationale behind the unannounced audit program will continue to be periodically reviewed, it is, in the final analysis, the DCI's preferred approach. [redacted] 25X1

(4) The "SPECLE problem" has been under scrutiny for about 2 years. During this continuing review, it has become apparent that the lack of good centralized records on Sensitive Compartmented Information (SCI) access approvals is an aggravation -- but not so critical that large investments of money and manpower or potentially divisive policy decisions at the Intelligence Community level have been forthcoming. The draft report quite correctly highlights the myriad problems with SPECLE. The Office of Security continues to both endorse and work towards the proposed solution. [redacted] 25X1

SUBJECT: Inspector General's Draft Report on Industrial Contracting and Security, August 1979 [redacted] 25X1

(5) The contractors' uneasiness and perhaps even resentment that they are somehow viewed as being less trustworthy than their Government counterparts is a recurring theme in the draft report. Their perception, for example, that the two-person escort rule for classified documents is unevenly applied is cited several times. We agree that it may not be appropriate to apply different standards to persons who have been similarly investigated and polygraphed merely because one individual works for the Agency while the other does not. We are reviewing the various aspects of the "trustworthiness" issue with a view toward a single, flexible and program-wide application of rules whenever this is possible. One complication, however, is the fact that a full-fledged DOD-type polygraph, similar in scope to that given to Government employees, has not been universally accepted by our contractors. [redacted] 25X1

(6) Lastly, the question of scaling down the audit program is a delicate one. We have already had to divert some resources from that program to handle other new requirements that have been recently levied on the office. We fully support the concept of more industrial security officers who, with their more frequent contact with our contractors, would improve security awareness and bring about greater compliance, but an independent audit activity is central to an effective industrial security program. Impartial, objective assessments enable the Director of Security to carry out his mandate to determine the effectiveness with which security programs and policies are being accomplished. We do not believe our audit resources are excessive; in fact, we are constantly reassessing the situation to ensure that they remain adequate. [redacted] 25X1

SUBJECT: Inspector General's Draft Report on Industrial Contracting and Security, August 1979 [redacted] 25X1

3. Comments on Formal Recommendations Set Forth in Tab A of the Draft Report

Recommendation A-1: That the Director consider designating and authorizing an appropriate official to have access to data on all contractual activity conducted anywhere in the Central Intelligence Agency, and task that official to monitor that data for such purposes as the Director may specify. [redacted] 25X1

Comment: This recommendation is very close to Recommendation #25 by the Task Force on Industrial Contracting and Industrial Security which recommended "That a compartmented contract management system be developed which would include the requirements of the users of CONIF, STEPS, and SPA . . . ." Discussion of implementation of this recommendation by the task force considered the possibility of merging STEPS, SPA and CONIF into one integrated system which would be responsive to all needs for contract information. It was finally determined that a development of such a system would be expensive and time consuming. A further consideration was the fact that the SPA system is a useful working system which serves important management purposes in DDS&T. For these reasons it was decided to continue the SPA system as well as the CONIF system but to include additional elements in the SPA data base to make the data bases for CONIF and SPA uniformly responsive to requests for information. This effort is essentially complete with a review having been made of the SPA data elements to be added. SPA will not have the same production capability that CONIF has but will be able to meet the majority of user requirements based on our history with the CONIF system. The STEPS system is not a problem since contracts in that system involve Agency funds and are already included in the CONIF system. This background information is provided to advise the Inspector General that the subject of this recommendation has been considered and much progress has been made toward improving access to contract information. [redacted] 25X1

The Deputy Director for Administration has no objections to the recommendation as written, subject to the designated official being located in the Office of the Comptroller. [redacted] 25X1

SUBJECT: Inspector General's Draft Report on Industrial Contracting and Security, August 1979 [redacted] 25X1

Recommendation A-2: That the Director of Central Intelligence revoke the provisions of [redacted] governing functioning of the Agency Contract Review Board which provide for waivers of board review (of cases which otherwise fall within the parameters established for review by the board) except in cases where the DCI or DDCI approve waiving the review. 25X1

Comment: The narrative supporting this recommendation suggests that the Chairman of the Contract Review Board has abused the authority included in [redacted] to provide waivers from review of qualifying contracts by the Agency Contract Review Board. We have researched this matter since receipt of the draft IG report and have found that out of 59 procurement actions qualifying for review by the Agency Contract Review Board, 8 were waived with no post-review required. Of these 8, 2 were reviewed in depth by the Procurement Management Staff, OL, and were waived from full board review on the basis that the cases were straightforward, with no significant procurement issues apparent for consideration. We believe this type of staff support by OL/PMS should continue since there are occasionally procurement actions which meet the $300,000 qualifying threshold but involve fixed price, off-the-shelf items for which there is no possible alternative source. Such cases clearly do not warrant review by the full board. Of the total number of these reviewed, 7 were post-reviews, i.e., subject to contract negotiation. One of the reasons for granting waiver from board review is based on sensitive projects which are bigot listed and which the requesting office, based upon DCI or DDCI guidance, does not want to include additional parties in the need-to-know group. 25X1

On the basis of our review, it is felt that no abuse has occurred and we do not concur with the recommendation as stated. The Director of Logistics is the senior contracting officer for CIA and must have full authority to manage Agency procurement issues. Placement at the DCI level of the authority to waive CRB action would, in our view, be unworkable and could, in some cases, unnecessarily delay important procurement actions.

SUBJECT: Inspector General's Draft Report on Industrial Contracting and Security, August 1979 [redacted] 25X1

Recommendation A-3: That the Director of Central Intelligence replace the system of centrally managed ceilings on access approvals for contractor personnel by tasking project managers to manage the number of access approvals granted so as to maintain the minimum consistent with effective completion of each project. [redacted] 25X1

Comment: The DDA concurs with this recommendation. [redacted] 25X1

Recommendation A-4: That the Director of Central Intelligence instruct appropriate officials to develop a program requiring DCAA auditors and other non-Agency personnel who commingle with Agency people during the course of classified work and have access to Agency secrets to meet the same standards for access approval as Agency staff employees, to specifically include the requirement to be polygraphed, and to develop implementing instructions for phasing in the new standards over a reasonable period of time. [redacted] 25X1

Comment: We believe this recommendation represents a necessary action and should be implemented. [redacted] 25X1

Recommendation B-1: That the Deputy Director for Science and Technology evaluate the feasibility of providing for a review mechanism substantially as discussed above, integrated with current Agency and Office of Public Affairs procedures for pre-publication review, and of developing procedures for advising contractor personnel of this opportunity to publish in appropriate cases; and that the DDS&T make the results of his determination available to the DDA for possible adoption in dealing with contractors under DDA jurisdiction. [redacted] 25X1

Comment: The DDA takes no exception to this recommendation except to note that the problem of publications review is broader than just the DDS&T. Those contractors working for NFAC and for the DDA may also have requirements for pre-publication review. [redacted] 25X1

SUBJECT: Inspector General's Draft Report on Industrial Contracting and Security, August 1979 [redacted] 25X1

Recommendation C-1: That the Deputy Director for Administration, with assistance from the General Counsel, review Agency regulations with respect to sole source procurement to ensure that they are not more restrictive than the authorities granted the Director of Central Intelligence by applicable provisions of law, and that such regulations clearly enunciate policy on use of existing
25X1 authority. [redacted]

Comment: Attached hereto is a memorandum from the Office of General Counsel (OGC 79-08626) which addresses this recommendation. It is the opinion of the Office of General Counsel (OGC) that the Agency's procurement regulation, which essentially incorporates the Defense Acquisition Regulation (DAR), is adequate. To expand the usage of sole source would be an improper abuse. The OGC concludes that ". . ., given the existing laws, executive order and procurement regulations, ample authority exists to effect sole source procurements within the limits of the law, procurement regulations and the Comptroller General decisions interpreting same." [redacted] 25X1

Recommendation C-2: That the Deputy Director for Administration, in coordination with the Deputy Director for Science and Technology, cause an updated version of the Project Officer's Manual to be prepared and issued as rapidly as possible, and that short briefing courses on its contents be provided on call for the benefit of technical representatives unable to attend the longer "Project Officer in the Contract Cycle" course. The manual should include performance standards for contracting officers' technical representatives sufficient to permit their performance to be evaluated by supervisors. [redacted] 25X1

Comment: This recommendation is similar to Recommendation #12 (Final Report) by the Task Force on Industrial Contracting and Industrial Security. Based on that recommendation by the task force, an objective was established with the Office of Logistics Management By Objective Program to develop such a manual. A task force has been working on this project for 11 months and is nearing completion.

SUBJECT: Inspector General's Draft Report on Industrial Contracting and Security, August 1979 [redacted] 25X1

While the manual does not include performance standards for contracting officers' technical representatives sufficient to permit their evaluation by supervisors, it does include those duties which COTRs must be responsible for. We expect that this manual will be completed and published approximately January 1980.

The DDA concurs with this recommendation, will publish the designated manual, and will, in conjunction with DDS&T, provide short briefing courses. The brief courses are necessarily dependent on availability of resources since no such provision has been made in our current resource package.

Recommendation C-3: That the Deputy Director for Administration review all active contract files to determine whether there is government-furnished non-expendable equipment of significant value involved, whether adequate control and accountability exist in cases involving such equipment, and what remedial action is necessary and feasible in cases where deficiencies are identified, the activities of such a review to include visits to contractor facilities for purposes of inventorying Government-furnished equipment and reestablishing accountability in appropriate cases.

Comment: Review of all active contract files to determine whether there is Government-furnished non-expendable equipment of significant value involved is an enormous task when one considers that we have [redacted] active contracts as of this date (20 September 1979). 25X1
We do not believe that the value of such non-expendable equipment assigned to our contractors warrants the enormous effort which would be involved in reviewing all of these active contract files. We further believe that our procedures are adequate for control of property. As an example, contracting officers are required to ensure that ". . .each contractor under his cognizance which possess or will possess Government property has a property management system which substantially conforms to the requirements set forth in DAR Appendix B, 'Government Property in Possession of Contractors.'" In the event that the contractor does not have an approved system, the contracting officer must direct the contractor to take whatever steps are required to acquire an adequate system. Such property must, by regulation, be identified with the Agency in such a way that Agency association is not compromised.

SUBJECT: Inspector General's Draft Report on Industrial Contracting and Security, August 1979 [redacted] 25X1

Comprehensive inventories of Government property are required from our contractors as of 30 September of each year. Commercial Systems & Audit Division, Office of Finance, is required by our handbook to perform a test audit of contractor's property system and procedures for both Government-furnished and acquired property under the contract. In addition to these safeguards, we note that the majority of our contractors also contract for DoD and have approval of their property systems from DoD. We have only recently issued a letter to our contractors which asked that they provide current notification of approval by DoD or other Government agencies of their property system. [redacted] 25X1

While the inspector has properly noted deficiencies, we do not believe that these deficiencies are a result of defective system of regulations or procedures. We believe instead that they represent intermittent cases of human failure. We are taking action to immediately remind our contracting officers of the importance of enforcing existing laws and regulations on property control and also will include property management as a checkpoint to be covered by Procurement Management Staff, OL, in its inspection of procurement components. We believe these strengthened procedures will provide required protection of Government interests. [redacted] 25X1

Recommendation C-4: That the Deputy Director for Administration designate a central registry point for all letter contracts, responsible for maintaining records of letter contracts issued and suspense dates for subsequent definitization of them, and for taking necessary follow-up action to ensure compliance with those suspense dates; and that the DDA issue necessary instructions requiring contracting officers who write letter contracts to register them with the central registry point. [redacted] 25X1

Comment: Our CONIF system, which includes contract information on Agency-funded contracts, includes an indicator for letter contracts. With this indicator we are able to easily identify such contracts in the system. No scheduled date for definitization is included in the system and there is no routine management review other than at the contracting officer level to ensure that contracts are definitized on a timely basis. We note that out of 1,723 contracts written during FY 79, only 3 were letter contracts. Based on these statistics

SUBJECT: Inspector General's Draft Report on Industrial Contracting and Security, August 1979 [redacted] 25X1

we do not feel that the problem warrants designation of a central registry point for maintaining records or letter orders issued and suspense dates for definitization. We note that this response applies only to Agency-funded contracts executed with contracting authority delegated by the Director of
25X1 Logistics. [redacted]

4. Comments and Recommended Changes or Corrections to the Text of the Report

a. Pages 17-18: The sentence beginning on the bottom of page 17 with the words "In the realm of the industrial . . ." and ending on page 18 is not clear. Perhaps the words "impact on" should be substituted for "components of." [redacted] 25X1

b. Page 24: The description of noncompetitive acquisition in terms of the basic situations is confusing. What constitutes a competitive or noncompetitive procurement is defined in DAR 21-126. For example, a contract is considered competitive even though only one offer is received when offers are solicited from at least two responsible offerors who normally contend for contracts for same or similar items. The provisions which define competitive and noncompetitive procurements are lengthy and somewhat complicated. [redacted] 25X1

c. Pages 24-45, which discuss competitive versus noncompetitive procurement, should be reviewed in light of the OGC memorandum attached hereto. [redacted] 25X1

d. Pages 42-43: The problem involving the contractor who made a dozen phone calls before finding the right person is unfortunate but it is not clear that this is a recurring problem which would necessitate a policy directive on the issue. Including the name and telephone number of a representative of the contracting officer, the industrial security officer, and the contracting officer's technical representative will not necessarily stop such situations from developing because of the frequency of personnel and organizational changes within the Agency. Secure mailing addresses routinely appear in the
25X1 contract. [redacted]

SUBJECT: Inspector General's Draft Report on Industrial Contracting and Security, August 1979 [redacted] 25X1

e. Page 44: After reading this page, as well as pages 56 and 214, one gets the idea that the contracting officer performs a review function only in the justification of a noncompetitive procurement, and the line manager makes the sole source determination. This is not the case. The language on these pages should be clarified to make it clear that the contracting officer is responsible for the source
25X1 selection. [redacted]

f. Page 47: The COTR does not have the sole responsibility for following up on delinquent reports from contractors. There is a joint responsibility between the COTR and the contract administrator to ensure that reports are submitted in accordance with the terms of the contract. [redacted] 25X1

g. Page 51: It is not unusual for a contractor to
25X1 receive [redacted] contracts. [redacted] 25X1

h. Page 65: The business justification form is the equivalent of a memorandum of negotiation and is supposed to be used for that purpose. The title of the document used for Agency funded contracts is the "Procurement Justification and Routing Sheet" (Form 1218). [redacted] 25X1

i. Page 67: In the second paragraph, which discusses "post endorsement" for a given contract, the document being referred to is not entitled "Request for Procurement Services." It is called the "Procurement Justification and Routing Sheet." The purpose of the endorsement is not to obtain advice of specialists (this advice should be obtained prior to entering into negotiations) but to ensure that the resultant contract meets legal, security, and sometimes technical requirements. [redacted] 25X1

SUBJECT: Inspector General's Draft Report on Industrial Contracting and Security, August 1979 [redacted] 25X1

j. Page 91: The Office of Logistics provides the reviewing official's comments on the fitness report for the chief of the NPAC and OD&E contract teams, and the Chief, Procurement Management Staff, DDS&T. Chief, Procurement Management Staff, DDS&T, is the reviewing official for the chiefs of the ORD, OSO and OTS contract teams. [redacted] 25X1

k. Page 94: Add OD&E/DEG and three teams within Procurement Division, OL, to the list of Agency contract teams. [redacted] 25X1

l. Page 108: The word "obligated" should be substituted for the word "committed" under the discussion of end of fiscal year funds. [redacted] 25X1

m. Page 116: For the sake of clarification, the determination of need-to-know is made by the contracting officer's technical representative/project officer, not the contracting officer's security representative. [redacted] 25X1

n. Page 118: The ceiling is on Security Access Approvals rather than Industrial Security Approvals. The quote from the new manual refers only to the latter, although the principle involved could also be applied to the former. [redacted] 25X1

o. Page 126: The reference to equal opportunity employment in the last sentence is not relevant to the topic of minority/small business. [redacted] 25X1

p. Page 128: We agree with the comments regarding the heavy turnover of personnel within the Industrial and Certification Branch of Clearance Division. The report should specify, however, that the issue relates to clerical personnel in particular and in the larger sense pertains to a high clerical turnover within Clearance Division as a whole. [redacted] 25X1

SUBJECT: Inspector General's Draft Report on Industrial Contracting and Security, August 1979 [ ] .25X1

q. Pages 141-142: A program of widespread installation and use of secure voice systems is hampered by two significant factors: cost and availability. Regarding the use of extraordinary costs created by the demands of security, these costs are negotiable under individual contracts. We are aware that small contractors are concerned about not having a large pool of cleared personnel that bigger firms have available and that this is perceived by them to restrict their competitive opportunities when a quick response is needed. Everything is being done to ensure that such contractors are not penalized in those instances. [ ] 25X1

r. Page 146: Regarding the complaint of too many security procedures, it should be made clear that those procedures were delineated (in the manual) to supply management with specific guidance to assist them in improving security and to respond, specifically, to contractors' past pleas for procedural uniformity. [ ] 25X1

s. Page 147: The two significant factors influencing the presentation of periodic seminars and conferences are our concerns for cover equities and need-to-know among the various contractors and manpower constraints. Considering those factors, and given the fact that the Industrial Security Branch is only 2 years old and in that time we will already have given 2 symposiums/conferences, our security conference track record is believed to be satisfactory. [ ] 25X1

t. Pages 150-151: Concerning one contractor consulting another on a given security-related issue, very often, under the specific guidance of an industrial security officer, a certain contractor is put in contact with another contractor simply to take advantage of a particular expertise the latter contractor may have. [ ] 25X1

SUBJECT: Inspector General's Draft Report on Industrial Contracting and Security, August 1979 [redacted] 25X1

u. Page 152: Some 40 KY-70 secure voice systems are now available to be installed as Government-furnished equipment at certain contractors' facilities within the next several months. These systems, which presently cost about $40,000 per unit, utilize commercial telephone circuits. This program is sponsored by the DDS&T; however, projections are that they will become available on the open market and that other contractors will see a need for them in their 25X1 facilities. [redacted]

v. Page 161: The Nondisclosure Agreement (Form 4066) is currently under revision to delete from paragraph 5 "termination of employment" and use instead "termination of 25X1 access." [redacted]

w. Page 166: Positive steps have been taken by the Industrial Security Branch to reduce drastically the length of time required to put the audit recommendations into the hands of the industrial security officers in the Office of Logistics and the Office of Development and Engineering. We now brief the industrial security officers and provide a written summary of recommendations to them within 10 days 25X1 after the audit. [redacted]

x. Pages 167-170: Regarding the promulgation of changes in security procedures, the problem is basically one of communicating information to a large number of contractors without the basic means, mainly due to insufficient resources, to disseminate the information in a timely fashion. There also is some justifiable criticism in that many audits were conducted against standards which had not as yet been 25X1 promulgated or implemented. [redacted]

y. Page 170, line 8: The requirement to keep a container in an alarmed area is not new. The United States Intelligence Board and old green and white books (Security Requirements for Contractors) levy this requirement. [redacted] 25X1

SUBJECT: Inspector General's Draft Report on Industrial Contracting and Security, August 1979 [ ] 25X1

z. Page 178: The type of merger and area designation of responsibility recommended here appears impractical in view of the dual delegation of contracting authority presently in effect, and the compartmentation aspects of most National Programs. [ ] 25X1

aa. Page 189: The second paragraph on this page is no longer accurate. A procedure was recently worked out between the Compartmented Information Branch, OD&E, and Clearance Division to handle such cases. [ ] 25X1

bb. Page 193: Direct interview of the subject of an investigation is being done more and more often, particularly where information is developed regarding emotional instability and resultant treatment, and further inquiry through the subject's employer or other individuals would be inappropriate. [ ] 25X1

cc. Page 194: Background investigations on individuals by other Government agencies are usually identified during the National Agency Checks. They are reviewed for basic coverage, then either accepted, supplemented or brought up-to-date as necessary to meet Agency standards. Duplication of investigative coverage is minimal. DCID 1/14 provides a uniform standard for codeword clearances. [ ] 25X1

dd. Page 197: The heading up of a topic entitled "Conflicts of Interest" is confusing since several other different topics are discussed under Section VIII, Issues of Compliance: Legality and Propriety. This could be corrected by establishing a uniform procedure for identifying the topics being discussed. [ ] 25X1

ee. Pages 198-200: Consideration should be given to making a recommendation that the Office of the Inspector General and the Office of General Counsel be notified of any commitment of funds without authority. [ ] 25X1

SUBJECT: Inspector General's Draft Report on Industrial Contracting and Security, August 1979 [redacted] 25X1

5. Conclusion:

We appreciate the opportunity to review subject draft and hope that our comments will be of value to you in the preparation of your final report. If you have any questions, please feel free to let us know what they are and we will be happy to respond. [redacted] 25X1

/s/ C. D. May

for Don I. Wortman

Attachment

Distribution:
Orig - Ads w/att
2 - DDA w/att
✓1 - OL Official (return to OL)
Distribution Withheld:
1 - D/L Chrono
1 - OL/PMS Subject
1 - OL/PMS Chrono

25X1 OL/PMS: [redacted] 10 Oct 79

Originating Offices:

25X1 /s [redacted]

Acting Director of Logistics

Date

25X1 [redacted]

A/ Director of Security

17 OCT 1979

Date

ATT

Approved For Release 2003/07/31 : CIA-RDP82-00599R000100170001-8

OGC 79-08626

21 September 1979

MEMORANDUM FOR: Director of Logistics

5X1 FROM: [redacted]
Assistant General Counsel

SUBJECT: Office of Inspector General Industrial Contracting and Security Report, dated August 1979 [redacted] 25

5X1 REFERENCE: [redacted]

1. Purpose. You have asked for a legal opinion regarding Recommendation C-1 which states:

> "That the Deputy Director for Administration, with assistance from the General Counsel, review Agency regulations with respect to sole source procurement to ensure that they are not more restrictive than the authorities granted the Director of Central Intelligence by applicable provisions of law, and that such regulations clearly enunciate policy on use of existing
5X1 authority." [redacted]

In the opinion of the undersigned, the Agency's procurement regulation which essentially incorporates the Defense Acquisition Regulation (DAR), is adequate. To expand the usage of sole source would be an improper abuse.

2. As you are aware, the Agency procurement regulation is
5X1 [redacted] The regulation is intentionally brief and its essence is found in paragraph 2b which expresses the acquisition policy of the Agency. That paragraph provides:

> "(1) Within limits imposed by statutes or other authorities external to the CIA, the Director of Logistics will conduct procurement activities and make commitments binding the Government in accordance with standards, arrangements, methods, and terms most advantageous to the Government. Unless security or other considerations peculiar to the Agency's mission require procurement to be carried out in some other manner, it will be accomplished to the maximum practicable extent in 25
> accordance with the procedures and standards of the

[redacted]

SUBJECT: Office of Inspector General Industrial Contracting and Security Reprot, dated August 1979 [redacted] 25X1

Department of Defense, as evidenced by the Armed Services Procurement Regulation as it now exists or may be amended, except in areas such as Automatic Data Processing Equipment where the Federal Procurement Regulation is applicable to executive agencies.

"(2) The Federal Government procurement regulations cited above require that all procurements utilizing appropriated funds, whether by formal advertising or by negotiation, be made on a competitive basis to the maximum practicable extent within the limitation of statutory responsibility to protect sensitive intelligence sources and methods. Agency personnel involved in the procurement process should plan and execute their procurement reqponsibilities in such a way that maximum compliance with the requirements for competition will be achieved." [redacted] 25X1

3. The policy statement provides that the Agency shall follow the Armed Services Procurement Regulation (ASPR), now known as the DAR, to the maximum practicable extent. Likewise, the policy points out that the Federal Government procurement regulations referred to require that all procurements be made on a competitive basis to the maximum practicable extent within the limitation of statutory responsibility to protect sources and methods. The latter provision is not entirely accurate in that neither ASPR/DAR nor the Federal Procurement Regulation (FPR) make reference to the statutory duty of the DCI to protect sources and methods. Nevertheless, the thrust of the Agency regulation is that we follow the DAR, and the FPR where automatic data processing acquisitions are concerned, and effect acquisitions on a competitive basis. There is added an important qualification to the process; namely, the provision which states "to the maximum extent practicable."

It would not be unreasonable to presume that such a qualifying statement would give rise to a looser interpretation of the restraints associated with sole source procurement. To answer this, a close examination of this Agency's procurement authorities is necessary. [redacted] 25X1

SUBJECT: Office of Inspector General Industrial Contracting and Security Report, dated August 1979 [redacted] 25X1

4. Power of the United States to Contract - Source of Authority. The United States, as a sovereign, has inherent power to enter into contracts and seek their enforcement, even though not expressly authorized by the Constitution or statute (United States v. Tingey, 30 U.S. (5 Pet.) 115 (1831)). The Supreme Court in Tingey held:

> ". . . the United States, as a body politic, may within the sphere of the constitutional powers confided to it, and through the instrumentality of the proper department to which those powers are confided, enter into contracts not prohibited by law, and appropriate to the just exercise of those powers. (30 U.S. (5 Pet.) at 128)" [redacted] 25X1

5. This general principle recognizes that the abstract power to contract is coextensive with, but may not exceed, the constitutional authority of the United States. The President may derive power to contract from either his position as chief-executive and commander-in-chief or from the acts of Congress. Thus, it can be seen that constitutional authority is distributed between the legislative and executive branches of the Government. If not expressly conferred, the power of executive departments to contract is implied as a necessary incident to the proper performance of public duties. (United States v. Maurice, 26 Fed. Cas. No. 11211 (C.C.D. Va. 1823). In United States v. Salon, 182 F.2d 110 (7th Cir. 1950), the Circuit Court of Appeals held the power to contract was implied from an executive order authorizing an administrator to take control of and operate private transportation system in a wartime emergency.) This holding continues to be the law (other citations omitted). [redacted] 25X1

6. Limitations Upon the Power of Executive Departments to Contract. Congress in the exercise of its constitutional powers under Article I, may limit the power of the executive departments to contract. While the executive departments are not wholly dependent upon Congress for power to contract, it

SUBJECT: Office of Inspector General Industrial Contracting and Security Report, dated August 1979 [redacted] 25X1

has long been held that they are clearly bound by congressional restrictions upon the exercise of that power (United States v. Tingey, supra; Moses v. United States, 166 U.S. 571 (1897); Constable v. United States, 154 U.S. 51 (1894)).

An important general prohibition is that "no contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment." (41 U.S.C.A. 11 (1970)) Similarly, there exists an important general limitation; namely, that "purchases of and contracts for property or services shall be made by formal advertising." Specifically, 41 U.S.C.A. 252(c) (1970), states:

> "All purchases and contracts for property and services shall be made by advertising, as provided in section 253 of this title, except that such purchases and contracts may be negotiated by the agency head without advertising if--
>
> > [therein after are enumerated 15 exceptions one of which is exception (10) that permits a negotiated procurement for property or services for which it is impracticable to secure competition. This is also known as sole source. Furthermore, another exception, exception (11) states that where the agency head determines that the purchase or contract is for experimental, developmental, or research work, or for the manufacture or furnishing of property for experimentation, development, research, or test, the procurement may be accomplished by negotiation. These examples are not exclusive]."

Likewise, 10 U.S.C.A. 2304(a) provides similar authority for the Department of Defense (DOD). It must be noted that the sole source exception to negotiations (10 U.S.C. 2304(a)(10)), as well as other exceptions, are also made applicable to the Agency by means of section 3(a) of the CIA Act wherein it is provided:

SUBJECT: Office of Inspector General Industrial Contracting and Security Report, dated August 1979 [redacted] 25X1

> "In the performance of its functions the Central Intelligence Agency is authorized to exercise the authorities contained in sections [2(c)(1), (2), (3), (4), (5), (6), (10), (12), (15), (17), and sections 3, 4, 5, 6 and 10 of the Armed Services Procurement Act of 1947 (Public Law 413, Eighteth Congress, second session)]."

These are important points which will also be discussed later from another prospective; however, such statutory provisions, as a primary goal determine the extent to which the theoretical power of the United States to contract, has been defined and limited by statute. There are numerous restrictions imposed on procurement by various regulations, directly and indirectly. It is baldly apparent that the power to contract by an executive 25X1 agency is not unfettered. [redacted]

7. The Exercise of Contracting Authority Within An Agency. The general power of the Government to contract is delegated to and exercised by specified executive agencies. The Supreme Court in considering the authority of Government agents stated In the Floyd Acceptances, 74 U.S. (7 Wall.) 666, 675-676 (1868):

> ". . . But the Government is an abstract entity, which has no hand to write or mouth to speak, and has no signature which can be recognized, as in the case of an individual. It speaks and acts only through agents, or more properly officers . . . The answer, which at once suggests itself to one familiar with the structure of our Government, in which all power is delegated, and is defined by law, constitutional or statutory is, that to one or both of these sources we must resort in every instance. We have no officers in this Government, from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority. And while some of these, as the President, the Legislature, and the Judiciary, exercise powers in some sense left to more general definitions necessarily incident to fundamental law found in the Constitution, the larger portion of them are the creation of statutory law, with duties and powers prescribed and limited by that law."

SUBJECT: Office of Inspector General Industrial Contracting and Security Report, dated August 1979 [redacted] 25X1

These agencies and their contracting officers cannot, however, bind the United States beyond the actual authority conferred upon them by statute or regulation. (Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947)). [redacted] 25X1

8. Agency Acquisition Authorities. Aside from the inherent authority to effect procurements in order to accomplish its functions as does any executive agency, the Central Intelligence Agency gets its power from various statutes and an executive order. They are the CIA Act of 1949, the Armed Services Act of 1947, the Federal Property and Administrative Services Act of 1949, as amended, and Executive Order 12036. These shall be examined in a historical fashion. [redacted] 25X1

9. The Central Intelligence Agency Act of 1949, as amended, provides in section 3, limited procurement authorities (50 U.S.C.A. 403c). The specific wording of section 3 has been expressed above and will not be repeated at this point. Section 3 extracts authority for the Agency to utilize certain, but not all, of the exceptions to the requirement for formal advertising found in the Armed Services Procurement Act of 1947 (Public Law 413, Eightieth Congress, second session, 62 Stat. 21, P.L. 80-413, February 19, 1948, 10 U.S.C.A. 2301, et seq, hereinafter referred to as ASPA).

These subsections of the Armed Services Procurement Act of 1947 thus are authority for the Agency to negotiate purchases and contracts for supplies and services, without advertising, if:

> "(1) determined to be necessary in the public interest during the period of a national emergency declared by the President or by the Congress;
>
> (2) the public exigency will not admit of the delay incident to advertising;
>
> (3) the aggregate amount involved does not exceed $1,000;
>
> (4) for personal or professional services;

SUBJECT: Office of Inspector General Industrial Contracting and Security Report, dated August 1979 [redacted] 25X1

(5) for any service to be rendered by any university, college, or other educational institution;

(6) the supplies or services are to be procured and used outside the limits of the United States and its possessions;

(10) for supplies or services for which it is impracticable to secure competition;

(12) for supplies or services as to which the agency head determines that the character, ingredients, or components thereof are such that the purchase or contract should not be publicly disclosed;

(15) for supplies or services as to which the agency head determines that the bid prices after advertising therefor are not reasonable or have not been independently arrived at in open competition: Provided, That no negotiated purchase or contract may be entered into under this paragraph after the rejection of all bids received unless (A) notification of the intention to negotiate and reasonable opportunity to negotiate shall have been given by the agency head to each responsible bidder, (B) the negotiated price is lower than the lowest rejected bid price of a responsible bidder, as determined by the agency head, and (C) such negotiated price is the lowest negotiated price offered by any responsible supplier;

(17) otherwise authorized by law."

The subsections extracted from ASPA are no more than exceptions to formal advertising, a fact often not realized or otherwise forgotten. Because the Agency followed the ASPR since our inception, it is often misconceived that we get the bulk of our procurement authority from ASPA. But for the exceptions noted, we do not get any such authority from ASPA. The bulk of our authority comes from the Federal Property and Administrative Services Act of 1949 (63 Stat. 377, Pub. L. 81-152, June 30, 1949, 40 U.S.C.A. 471, et seq), hereinafter referred to as either the Federal Property Act or the Property Act. In

SUBJECT: Office of Inspector General Industrial Contracting and Security Report, dated August 1979 [redacted] 25X1

essence, the Federal Property Act reinacted ASPA and applied it to the Government in general. Although it is now nearly meaningless, it is also a fact that during the 10-day period between the passage of the CIA Act of 1949 on 20 June 1949 and the enactment of the Federal Property Act on 30 June 1949, the Agency's statutory procurement authority was limited solely to the meager provisions of section 3 of the CIA Act. Indeed, we could not function today if that condition prevailed since the Agency would lack statutory authority to effect the several types of procurements. What is meaningful, however, is that our section 3 authority was supplemented by the Federal Property Act authorities which have been quite adequate since they permit acquisitions essentially the same as does ASPA. Moreover, as is well known but often misunderstood, within the Federal Property Act there is a provision that nothing therein "shall impair or affect any authority of . . . the Central Intelligence Agency (40 U.S.C.A. 474(17)). The CIA, therefore, has statutory procurement authority in limited part from the aforementioned ASPA provision, and to a much larger part from the Federal Property and Administrative Services Act of 1949, as amended. Note those authorities that we obtain from the Armed Services Act of 1949 are literally frozen as of 1949 since no provision was made in section 3 of the CIA Act to recognize subsequent amendments to the ASPA. This apparent oversight would be disastrous were it not for the passage of the Federal Property Act ten days after the enactment of the CIA Act of 1949, since, as mentioned, the Property Act gave to civilian executive agencies essentially the same authorities as ASPA did to the DOD. As stated above, the Federal Property Act does provide for sole source procurements.

It is to be noted that while the Federal Property Act does permit exemptions from its provisions, and in the case of the CIA that power is found at 40 U.S.C.A. 474(17), the exemption authority may be exercised by the CIA only when the authority of the Agency is impaired or affected. Simply stated otherwise, this means the Agency cannot perform its functions under ordinary circumstances. It is an extraordinary remedy, to say the least, and one that can be exercised only on a case-by-case basis. It should not be confused with the authority to conduct sole

SUBJECT: Office of Inspector General Industrial Contracting and Security Report, dated August 1979 [redacted] 25X1

source procurements available to all executive agencies be they civilian or military and commonly known as "Exception 10." Where the conditions exist for a sole source acquisition, and there are innumerous Comptroller General decisions on this subject which go beyond the scope of this paper, a non-competitive procurement can be accomplished. No exemption to the Federal 25X1
Property Act would be appropriate or necessary. To exercise a exemption under such circumstances would clearly be improper. [redacted]

10. Executive Order 12036 also provides limited acquisition authority in section 1-810. In that section the CIA is authorized to carry out or contract for research, development, and procurement of technical systems and devices to authorized functions. It does not, however, provide for expedited procedures. [redacted] 25X1

11. ASPR/DAR as the Procurement Regulation of the CIA. A significant source of confusion regarding Agency procurement is found in our usage of ASPR/DAR. In 1947 when ASPA was enacted, the DOD simultaneously issued ASPR. The CIA came into formal existence 20 June 1949 and by reference incorporated limited procurement authorities found in ASPA. The Federal Property Act was passed ten days later, but unlike the circumstances attendant to the passage of ASPA, GSA did not immediately issue procurement regulations for the civilian agencies which includes the CIA. That the CIA is a civilian agency and not a part of DOD is a fact not to be overlooked since it is significant. The civilian agencies regulatory scheme did not manifest itself until March 1959 when the Federal Procurement Regulations were established, some ten years after passage of the Federal Property Act which authorized the Administration of GSA to promulgate such regulations. Essentially, 40 U.S.C.A. 481, Title II, section 201 of the Property Act, provides:

> ". . . The Administrator shall, in respect of executive agencies, and to the extent that he determines that so doing is advantageous to the Government in terms of economy, efficiency, or service, and with due regard to the program activities of the agencies concerned--
>
> (1) prescribe policies and methods of procurement and supply of personal property and nonpersonal services, including related functions such as contracting . . . ."

SUBJECT: Office of Inspector General Industrial Contracting and Security Report, dated August 1979 [redacted] 25X1

In addition to the general authority to issue procurement regulations which has been conferred in the Administrator of GSA by Title II of the Federal Property Act, more authority to issue such regulations is provided by section 302(a) of Title III of the same act which states:

> "302(a). Executive agencies shall make purchases and contracts for property and services in accordance with the provision of this title and implementing regulations of the Administration."

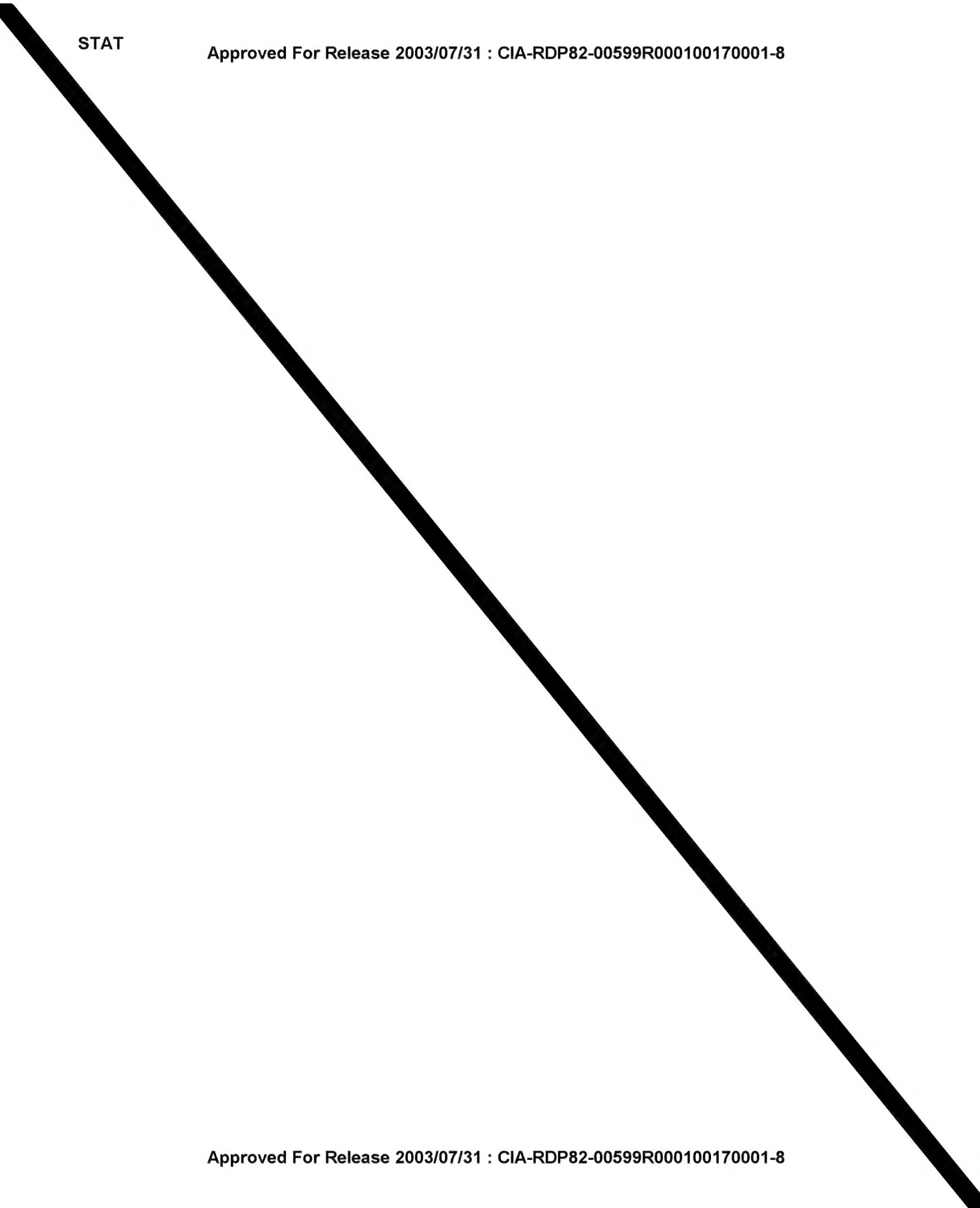
The statute goes on, however, to specifically exempt DOD, Coast Guard and NASA from the regulations.

In order for one not to lose sight of the realities of the situation because they are germane, during the decade following the passage of the Federal Property Act and the ultimate issuance of the FPR in response to President Eisenhower's direction, the various civilian executive agencies continued to rely upon their own procurement regulations. As each agency tailored its own regulations, the diversity grew to unacceptable proportions. The Agency, at this juncture, was relying upon ASPR as its regulation, in the same sense as the Department of Agriculture had its own. We simply borrowed DOD's regulatory scheme. However, when GSA finally issued the FPR scheme consisting of the FPR and the implementing and supplementing regulations of each civilian executive agency, the CIA did not participate. Instead, for avowed reasons of cover and protection of sources and methods, the CIA continued on with the usage of ASPR. That the CIA used ASPR has never been denied. That it should have followed the FPR at least since 1959 is moot. While there is no written finding by any DCI expressly exercising exemption (17), there is no requirement for it to be in writing. The Agency's adherence to ASPR/DAR since its inception when there were no FPR's, and particularly since 1959 when the FPR scheme was born, indicate implicitly that we have exempted ourselves from the FPR system save for the acquisition of automatic data processing which the 1965 Brooks amendment to the Federal Property and Administrative Services Act requires of all executive agencies without exception.

To exempt our Agency from following a regulatory scheme, such as the FPR which gets it life from the Federal Property Act,

SUBJECT: Office of Inspector General Industrial Contracting and Security Report, dated August 1979 [redacted] 25

is not to say that our procurement authorities, together with coincidental statutory limitations, are likewise exempt. Despite the fact we follow ASPR/DAR, the statutory basis for CIA procurements is largely, although not exclusively, found in the Federal Property Act. While it should be satisfying to know that we do have broad procurement authorities, they are neither mysterious nor abnormal and never have been. To believe otherwise reflects a profound misunderstanding of Agency procurement source. Hence, given the existing laws, executive order and procurement regulations, ample authority exists to effect sole source procurements within the limits of the law, procurement regulations and the Comptroller General decisions interpreting same. [redacted] 25



Approved For Release 2003/07/31 : CIA-RDP82-00599R000100170001-8